FOR ARGUMENT

No. 79-97

In the Supreme Court of the United States

OCTOBER TERM, 1979

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
PETITIONER

v.

MIDCAL ALUMINUM, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the court of appeal (Pet. App. A-1 to A-10)[1] is reported at 90 Cal. App. 3d 979.

JURISDICTION

The opinion of the court of appeal was entered on March 26, 1979. The California Supreme Court denied a timely petition for hearing on May 24, 1979. The petition for a writ of certiorari was filed on

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "A." refers to the Joint Appendix to the briefs filed in this Court.

July 19, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the California statutory prohibition of intrabrand price competition in the market for wholesale wine is invalid under the Supremacy Clause, and thus unenforceable, because it conflicts with the Sherman Act, 15 U.S.C. 1 *et seq.*

2. Whether Section 2 of the Twenty-First Amendment modifies the Supremacy Clause, so that a state statute regulating alcohol prevails over conflicting general federal law.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution and the Twenty-First Amendment of the United States Constitution are set forth in the appendix printed as part of petitioner's brief (A-1). Also set forth in that appendix are the Sherman Act, 15 U.S.C. 1 and 2 (A-9), the Webb-Kenyon Act, 27 U.S.C. 122 (A-10), and Sections 24862 and 24866 of Chapter 11 (Wine Fair Trade Contracts and Price Posting) of the California Business and Professions Code (West 1964 and Cum. Supp. 1979) (A-10 to A-12).

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Sections 24870, 24750.5, and 24752 of the California Business and Professions Code (West 1964), provide in pertinent part:

> § 24750.5. *Fair trade contracts for wine; authority.* Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11.
>
> § 24752. *Fair trade contracts; price cutting; unfair competition; right of action.* Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, or in any effective minimum retail price schedule filed with the department * * *, whether the person * * * is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.
>
> § 24870. *Basic selling and resale price; selling price; number of prices for same brand.* * * * The selling price contained in any schedule of selling prices shall be the same as the resale price contained in an effective fair trade contract and schedule of resale prices filed by the same licensee. * * *.

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the antitrust laws in the unregulated sector of our economy, and it seeks to promote the congressional policy of encouraging competition, where compatible with other statutory goals, in regulated industries. The United States recognizes the authority of the states to regulate their economies in a manner which restrains competition to some extent. It nonetheless has a strong interest in assuring that the states are not allowed simply to reject the competitive balances drawn by Congress between the interests of consumers, distributors, and producers of goods which travel in interstate commerce.

The United States is also responsible for enforcement of the Federal Alcohol Administration Act and the many other federal regulatory statutes (*e.g.*, securities and labor laws) which apply to the liquor industry as well as all other interstate commerce. The United States thus has an interest in assuring that these laws will not be subject to *de facto* revocation by the states absent action by Congress subordinating its own power over interstate commerce in liquor to that of the states.

STATEMENT

1. Section 24866 of the California Business and Professions Code (West 1964) requires, *inter alia*, that each wine producer file (or "post") with the State Department of Alcoholic Beverage Control ("the De-

partment") a schedule of resale prices and executed resale price maintenance contracts ("fair trade" contracts) for each brand of wine it owns or controls. The contract and schedule for each brand must contain the same prices (Cal. Bus. & Prof. Code § 24870 (West 1964)) and the same information on brand identity and terms of sale (§ 24869).

Wine wholesalers are, with no exceptions here relevant, forbidden to sell wine to retailers at any price other than that specified in an effective price schedule or fair trade contract (§ 24862 (West Cum. Supp. 1979));[2] and a violation of this provision subjects the wholesaler to any of a number of sanctions: fines, suspension of its license, license revocation (§ 24880 (West Cum. Supp. 1979)) and possibly an action for damages by an injured party (§ 24752 (1964)). When, for any reason, a wine producer has failed to establish prices, wholesalers are required to do so by posting a resale price schedule for the brands concerned (§ 24866(a) (1964)). A retail price schedule filed by one distributor binds all other wholesalers selling within the same trading area (Pet. App. A-9).

2. Respondent Midcal Aluminum is a wholesale distributor of Gallo wine in the southern trading area of the state. It sold 27 cases of Gallo wine to one

[2] Section 24862 requires compliance "unless otherwise provided in this chapter." Wholesalers in the "mountain area"—one of three trading areas (mountain, northern, and southern) defined in the Code § 24864 (West Cum. Supp. 1979))—are permitted to charge more, but not less, than the wholesale price set by the producer.

retailer, also in the southern trading area, at prices below those posted by Gallo with the Department (A. 16-17, 19). It also sold to other southern trading area retailers an unstated number of cases of wine for which no fair trade contract or resale price schedule had been posted (A. 17, 19). The Department brought administrative proceedings against Midcal charging these sales as violations of Section 24862 of the Code (A. 16-18). Midcal stipulated in that proceeding that the facts as charged were true, and agreed to accept sanctions subject to a determination of the validity of the statute (A. 19-20). It then sought mandamus from the appropriate state Court of Appeal (A. 3-11). Petitioner, the California Retail Liquor Dealers Association, a trade association of retail liquor stores, intervened in opposition (Pet. App. A-2 n.2).

3. The Court of Appeal held that the price posting provisions "result in price fixing in wine" contrary to the Sherman Act (Pet. App. A-5), and that the statute was accordingly invalid and unenforceable. It relied on a recent California Supreme Court decision that held a comparable price-posting statute for distilled spirits invalid under the Sherman Act. *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P. 2d 476 (1978) ("*Rice*") (reprinted at Pet. App. C-1 to C-39).

In *Rice*, the California Supreme Court held that "the conduct of the liquor producers" in filing their retail prices with the state liquor department was a change "of form rather than substance" (Pet. App.

C-6) from the use of resale price maintenance contracts, and as such constituted the price fixing proscribed by Section 1 of the Sherman Act. And it held, quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951), that "'[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme * * *'" (Pet. App. C-9).

The California Supreme Court rejected the Department's contention that the imposition of minimum retail prices here, unlike in *Schwegmann*, was "a sovereign act of the state exempt from the Sherman Act" (Pet. App. C-9). It reviewed this Court's "state action" decisions (Pet. App. C-11 to C-16), and distilled from them the rule that the state could not create Sherman Act immunity by "compel[ling] private persons to engage in anticompetitive conduct" where the state "essentially exercises no control over the substance of their actions" (Pet. App. C-16). It noted (Pet. App. C-17) that in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court buttressed its state-action finding by observing that the Arizona Supreme Court's "pointed re-examination" of disciplinary rules in enforcement proceedings (433 U.S. at 362) "reduce[d] the likelihood that federal antitrust policy would be unnecessarily subordinated to state policy." Under the California statute, by contrast, the State simply enforced prices set by private parties "without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers" (Pet.

App. C-18).[3] The California Supreme Court thus concluded that it "would be extending the decisions of [this] Court beyond their intended design if we were to hold * * * that this scheme is immune from the Sherman Act" (Pet. App. C-18).

The court below, in following this holding, held that there was no significant distinction between wine and distilled spirits, rejected the argument that protection of the domestic wine industry was a justification for the statute, and concluded that this statute, like the one in *Rice*, ran afoul of the Sherman Act (Pet. App. A-6 to A-7).[4]

Finally, the Court of Appeal declined to consider petitioner's argument that the authorization for state liquor regulation contained in the Twenty-First Amendment worked a pro tanto repeal of the Supremacy Clause (Pet. App. A-7 n.4), holding that it was bound by the California Supreme Court's holding on that issue in *Rice*. In that case, the California Supreme Court relied on this Court's holdings that the Twenty-First Amendment did not repeal altogether the Commerce Clause as a restriction on the state's power to regulate interstate commerce in alcohol,[5]

[3] It also held, as a matter of state law, that the Department's power to excuse a retailer from compliance with a producer-established retail price "for good cause" was not a general power to regulate prices (Pet. App. C-10 to C-11).

[4] *Rice* had previously been applied to the wine statute with respect to retail sales to consumers in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board,* 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979) (Pet. App. D-1 to D-4).

[5] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

and that it did not repeal other constitutional provisions, such as the Fourteenth Amendment, that restrict the states' powers (Pet. App. C-21 to C-27).[6] Balancing the policy of the Twenty-First Amendment and the State's interest in this type of alcohol sales regulation against the policies of the Sherman Act, enacted as an exercise of federal power under the Commerce Clause, the *Rice* court concluded that the federal interest should prevail (Pet. App. C-27 to C-39). In reaching this conclusion it noted, *inter alia,* that the price maintenance policies of the distilled spirits statute "clearly" conflicted with the policies of the Sherman Act (*id.* at C-34) and that the purposes for which the state statute was enacted—promotion of temperance and orderly marketing conditions—could be better served by laws that did not run afoul of the Sherman Act (*id.* at C-34 to C-39).

The California Supreme Court declined to review the decision of the Court of Appeal in this case (Pet. App. B).

SUMMARY OF ARGUMENT

The question presented in this case is whether California may require all wine wholesalers to charge for a brand of wine the price determined by the wine's producers, without providing for any state regulatory mechanism to protect the public interest from the evils associated with such restraints on price competition. The state court correctly held that such a bare pro-

[6] *Craig* v. *Boren,* 429 U.S. 190 (1976); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

hibition of price competition is inconsistent with the Sherman Act and hence invalid under the Supremacy Clause.

The central and unequivocal policy of the Sherman Act is the preservation of price competition at every level of production and sales. This policy, which this Court has described as producing "the best allocation of our economic resources" (*Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958)), was reaffirmed and made the unequivocal federal policy with respect to resale price maintenance restraints when Congress enacted the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, which repealed federal laws that had permitted exemptions from the Sherman Act for state laws authorizing such restraints under certain conditions. Congress repealed those laws because it concluded that resale price maintenance restraints did not in fact aid small independent businessmen—the traditional justification for such schemes—and had the undesirable effects of artificially raising prices paid by consumers and facilitating restraints on interbrand competition.

Under this Court's decisions, the states are free to protect the public interest by regulating their economies even when some anticompetitive effects may result. Here, however, that principle is inapplicable because California has simply instructed wine producers to set prices, wholly within their own discretion, at which otherwise independent wholesalers may sell their wine, and the State's role is merely to enforce this price-fixing scheme. Since the statutory provisions at issue here are thus no more than a pro tanto repeal of the Sherman Act, they are invalid under the Supremacy Clause unless, contrary to our submission, the Twenty-First Amendment is an impediment in this case to the ordinary operation of the Supremacy Clause on state laws that conflict with federal policies.

II

Section 2 of the Twenty-First Amendment declares that the transportation or importation of liquor into a state in violation of its laws is "prohibited." This simple provision was enacted in tandem with repeal of the Eighteenth Amendment, and its legislative history indicates that it reflects the Seventy-Second Congress' rejection both of the role Congress had taken on as enforcer of Prohibition under the Eighteenth Amendment and of the holdings in certain decisions of this Court that the Commerce Clause in itself limits inherent state police powers over liquor that has passed through interstate commerce. Congress had previously sought to overcome those decisions through passage of the Wilson Act and the Webb-Kenyon Act, but it deemed the enactment of a Constitutional amendment a more secure means of protecting traditional state powers over the local liquor trade. The legislative history of the Twenty-First Amendment does not, however, reflect an intent on the part of Congress to subordinate to the powers of state legislatures its own legislative powers under the Constitution as they existed prior to the Eighteenth Amendment.

Nor is such an intent reflected in the rejection of a proposed third section for the Twenty-First Amendment granting Congress concurrent power "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Although diverse views were expressed regarding the powers of Congress over the regulation of the local liquor trade either with or without this additional section, the dominant theme expressed by the opponents of Section 3 was that it presaged a repetition, at least with respect to regulation of saloons, of the unfortunate consequences of federal regulation of local mores concerning drinking under the Eighteenth Amendment.

The Twenty-First Amendment does not in terms restrict the pre-Eighteenth Amendment legislative powers of Congress except the power to require the "transportation or importation" of liquor into a state in violation of its laws. And since the apparent intent of those who adopted the Twenty-First Amendment was simply to repeal the grant of power made by the Eighteenth Amendment—power that was unconstrained by the limits of the Commerce Clause—and to eliminate the negative implications of the Commerce Clause for state legislative authority, Congress should not be deemed to have restricted its own constitutionally conferred legislative powers wholly by unstated implication.

This reading of the Amendment is supported by the enactment by a subsequent Congress, little more than two years later, of the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*, which contains provisions that expressly override contrary state law.

Moreover, that Act was passed only two days after Congress formally re-enacted the Webb-Kenyon Act, a statute that removed implied Commerce Clause restrictions on state legislative authority in a manner that this Court has found to be "constitutionaliz[ed]" in the Twenty-First Amendment. *Craig* v. *Boren*, 429 U.S. 190, 205-206 (1976).

This Court has not directly addressed the question posed in this case, but it has emphasized that the Twenty-First Amendment did not repeal the Commerce Clause pro tanto with respect to liquor and that each constitutional provision "must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Where, as here, Congress has exercised its constitutionally authorized powers, the Supremacy Clause can only mean that its enactments are the supreme law of the land, notwithstanding any state law to the contrary.

In the present case, the determination by the California state court that the wine-pricing provision at issue here is invalid because it directly contravenes federal antitrust policy in no way affects the basic state interests addressed by Section 2 of the Twenty-First Amendment. California remains free to promote, tolerate, or prohibit the liquor trade, and even to seek to promote temperance through a policy of high liquor prices, so long as it does not do so by means that directly and unnecessarily conflict with

federal law. A contrary determination would have an unsettling effect on numerous other federal statutes—such as the labor laws and the securities laws—that reach the liquor industry, without any compensating gain in advancing the essential purpose of the Twenty-First Amendment.

ARGUMENT

I. THE SHERMAN ACT AND THE CONSUMER GOODS PRICING ACT OF 1975 PREEMPT THE STATES FROM REQUIRING WHOLESALERS TO MAINTAIN PRODUCER-SET PRICES FOR BRANDS OF PRODUCTS, IN THE ABSENCE OF A STATE REGULATORY SCHEME PROTECTIVE OF THE PUBLIC INTEREST

The question presented in this case is whether California may require all wine wholesalers to charge for a brand of wine the price determined by the wine's producer. The California state court held that it may not. It properly acknowledged that a state law that is fundamentally inconsistent with federal law is unenforceable under the Supremacy Clause, and it correctly determined that the statutory scheme at issue here is inconsistent with the Sherman Act because it is a bare prohibition of conduct—price competition—that the Sherman Act promotes. Hence it is invalid under the Supremacy Clause.[7]

[7] This case does not directly present any question of federal antitrust liability of any persons for compliance with the California statutory scheme. We therefore comment only briefly on our understanding of how the governing legal

principles concerning such liability would apply in this context.

The source of the competitive restraint underlying this case is California's clearly articulated statutory prohibition of price competition. The State requires wine producers to establish a wholesale price for their wine, file it with the State Department of Alcoholic Beverage Control, and publish it in a trade journal. Wholesalers are then required to charge that price. The statute eliminates wholesale price competition by requiring that all wholesalers charge the same price.

The only private action in this context is the producer's decision to select the one price which all wholesalers must charge and the wholesalers' adherence to that price. In the absence of predation, an individual businessman's selection of one price rather than another does not in itself "restrain competition" as that phrase is used in antitrust law. Competition is eliminated by the State's requirement that all wholesalers adhere to that price, not by any discretionary private action of the producers and wholesalers (except for their failure to contest the validity of the state law).

Because Section 1 of the Sherman Act applies to restraints of trade "operat[ing] by force of individual agreement or combination" (*Parker* v. *Brown*, 317 U.S. 341, 350 (1943)), not to "act[s] of government by the State as sovereign" (*City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 413 (1978)) or to private conduct compelled by a state policy that itself eliminates competition (*Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)), no question of any Sherman Act violation arises if the state statutory scheme at issue satisfies the requirements outlined in those cases.

On the other hand, in the absence of the pertinent state statutes, the conduct at issue here would, at least by inference, be a concerted resale price maintenance scheme prohibited by the Sherman Act (see pages 23-29, *infra*). If, as we contend, the state statutes must yield to the Sherman Act under the Supremacy Clause (and are not saved by the Twenty-First Amendment), the prohibition of the Sherman Act similarly applies to that conduct. However, until the facially valid state statutes commanding that conduct are judicially nullified, there would, in our view, be no liability under the Sherman Act for conduct conforming to the state

A. In The Consumer Goods Pricing Act Of 1975 Congress Repealed The Statutory Exceptions To The Sherman Act for State-Authorized Resale Price Maintenance Restraints Because It Determined That Such Restraints Are Undesirable

The central and unequivocal policy of the Sherman Act is competition. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). Agreements fixing or even "tampering" with price—"the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940))—are per se unlawful.[8] The preservation of price competition at every level of production serves both economic and socio-political goals of Congress; for, as this Court has stated (*Northern Pacific Ry. Co.* v. *United States*, *supra*, 356 U.S. at 4), the preservation of price competition enables independent businessmen to make the personal economic calculations that will best service their interests and, through the operation of free markets, produces "the best allocation of our

statutory scheme—at least if performed in good faith reliance on the apparent compulsion of state law. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592 (1976); *id.* at 614 n.6 (Blackmun, J., concurring). Cf. *James* v. *United States*, 366 U.S. 213, 221-222 (1961) (opinion of Warren, C.J., joined by Brennan and Stewart, JJ.); *id.* at 241 (opinion of Clark, J.); *id.* at 241-248 (opinion of Harlan, J., joined by Frankfurter, J.).

[8] The direct injury to the public is so great, and the prospect of some coincidental and indirect benefit so dim, that no justification in economics or social policy is permitted in defense of a charge of price-fixing. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692-697 (1978).

economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Sherman Act thus prohibits producers from setting the prices at which independent wholesalers and retailers may sell their products. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 399-400 (1911). Such vertical price-fixing strikes at both valuable price competition and business independence, threatening to "destroy the dealers' independent discretion through restrictive agreements." *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920). Producers may not circumvent this prohibition by calling a sale a "consignment" where the buyer-consignee is in truth an independent businessman bearing the risk of loss. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 17-18, 20-22 (1964). They may not impose unwritten agreements on independent wholesalers and retailers by conditioning future sales on compliance with producer-set prices. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 45 & n.6 (1960). They may not compel independent retailers to maintain resale prices through other coercive means, such as termination of leases of non-cooperating retailers. *Simpson* v. *Union Oil*, *supra*, 377 U.S. at 15, 16. Such "agreements," coercively imposed by large producers on independent distributors, strike at the right of businessmen to determine the price at which they will sell their goods, "the only power they have

to be wholly independent businessmen, whose service depends on their own initiative and enterprise." 377 U.S. at 21.[9]

Indeed, after many years of allowing the states to authorize resale price maintenance agreements under certain conditions,[10] Congress repealed those authorization statutes in the Consumer Goods Pricing Act of 1975,[11] which reasserted the primacy of a federal policy promoting price competition and distributor pricing autonomy. In doing so, Congress carefully reviewed experience with resale price maintenance and concluded that such arrangements should not be permitted to intrude into the relationships between producers, distributors, and consumers.

Specifically Congress found that resale price maintenance, like most other price-fixing, produces "little but artificially high prices for consumers" and, worse, facilitates horizontal price fixing.[12] H.R. Rep. No. 94-

[9] The economic balance struck by Congress in favor of protecting the decision-making autonomy of distributors against manufacturer efforts to control their business practices is reflected in the Federal Trade Commission Act as well as the Sherman Act. See *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 368 (1965); *FTC* v. *Texaco Inc.*, 393 U.S. 223, 226-227 (1968).

[10] The Miller-Tydings Act, ch. 690, Tit. VIII, 50 Stat. 693 (1937) and the McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952), both repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

[11] See note 10, *supra*.

[12] Resale price maintenance enables manufacturers, wholesalers, and retailers to exchange price information in ways that might otherwise violate the antitrust laws because of

341, 94th Cong., 1st Sess. 1 (1975). Moreover, it found that the traditional justification for resale price maintenance, the protection of "Mom and Pop" retail stores, "will no longer withstand scrutiny." *Ibid.* Notwithstanding extensive experience with resale price maintenance, there was no economic evidence to show that it actually protected or promoted small retail stores. For example, non-fair-trade states did not suffer more predatory pricing or higher rates of small store failures than did states with resale price maintenance. *Id.* at 4; S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975). Indeed, Congress was concerned that resale price maintenance itself may have discouraged small, independent businessmen from attempting to enter the retail sales market by denying them the most common device to obtain a toe-hold in a market: aggressive price competition. H.R. Rep. No. 94-341, *supra*, at 4-5. Weighed along with all of this was the unquestioned effect of resale price maintenance to raise consumer prices and to deny consumers the choice between buying goods at relatively low prices and buying them from retailers who offer more services, convenience, or other intangible advantages. *Id.* at 3, 4. Congress therefore con-

their tendency to facilitate horizontal price-fixing agreements. Moreover, by concentrating price setting power in the hands of a few manufacturers, rather than thousands of wholesalers and retailers, resale price maintenance encourages price leadership and discourages aggressive price competition. See H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3-4 (1975). The California courts found a lack of horizontal price competition in the liquor industry in the State exactly because of these two effects of resale price maintenance. *Rice*, *supra* (Pet. App. C-31 to C-34).

cluded that resale price maintenance agreements, "in direct violation of the system of free competition which the antitrust laws are designed to promote" (*id.* at 2), should no longer enjoy immunity from the operation of the federal antitrust laws.

Congress having spoken, it follows, under the ordinary Supremacy Clause principle that a state may not authorize what Congress has validly prohibited, that the states are preempted from authorizing optional resale price maintenance restraints. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). State imposition of a mandatory resale price maintenance arrangement, such as is involved in this case, is, if anything, even more inconsistent with and inimical to Congress's clearly stated policy. The remaining question (other than the Twenty-First Amendment issue, discussed in point II, *infra*) is whether there is nonetheless an impediment to the ordinary operation of the Supremacy Clause here merely because of the mandatory nature of the state statutes at issue.

B. The State Statutory Provisions At Issue Conflict With The Sherman Act And The Consumer Goods Pricing Act Of 1975 And, Under the Supremacy Clause, Must Yield

In the face of the comprehensive federal policy of encouraging price competition and preserving wholesaler and retailer independence of producers and manufacturers, California has simply prohibited all intrabrand price competition and subjected wholesalers and retailers to the absolute power of pro-

ducers in determining liquor resale prices in the state of California. The state statutes serve only to prevent Congress' policy of resale price competition from operating on interstate commerce in liquor in California—they reject the balance drawn by Congress between the interests of consumers, producers and distributors and thus amount to nothing more than a form of pro tanto repeal of the Sherman Act. The California statutes are accordingly preempted under established Supremacy Clause analysis.[13]

As this Court recognized in *Parker* v. *Brown*, 317 U.S. 341, 350 (1943), the question of preemption is a federal statutory question of whether Congress has exercised its "familiar * * * constitutional power to suspend state laws." See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 618-622 (1976) (Stewart, J., dissenting). *Parker* involved a suit by a raisin packer to enjoin enforcement of a California regulatory program

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[13] Indeed, the Court has invalidated far less direct interferences by the states with balances drawn between conflicting economic groups or interests by Congress. See, *e.g.*, *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538, 541-542 (1945) (state law requiring state certification of union representative deemed to interfere with employee-employer balance struck by Congress); *Perez* v. *Campbell*, 402 U.S. 637 (1971) (state law which allowed judgment creditor to compel suspension of debtor's driver's license deemed to upset the balance between creditor and debtor interests reflected in the federal bankruptcy laws); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (state unfair competition laws upset congressional balance drawn between granting monopoly awards for innovation and promoting competition as reflected in the federal patent laws).

limiting the quantities of raisins which growers could sell on the open market. The regulation was similar to that involved in the instant case, in that both had the effect of raising the price of the commodity affected. The difference is that, under the regulatory plan involved in *Parker*, the supply restrictions had to be designed by a committee appointed by the State Director of Agriculture, and they did not take effect until approved by a vote of the growers in the district *and* by the State Agricultural Prorate Advisory Commission.[14] Under the statute involved here, the price maintenance schedule becomes effective without approval or review by anyone other than the producer who sets the price.

The essence of the Court's holding in *Parker* was that the Sherman Act was not intended to preclude states from regulating their economy, even if those regulations produced some anticompetitive results. See *New Motor Vehicle Board of Cal.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 111 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978). The Court noted that the Sherman Act was directed at *private* economic power, and at abuses of that power by individuals and corporations. 317 U.S. at 351. A system of regulation such as that involved in *Parker*, where the state retained complete control over the restrictions to be adopted, posed no threat of the abuse of private power, and the Court accordingly

[14] The Commission was composed of the State Director of Agriculture, and eight other members appointed by the Governor and confirmed by the State Senate. 317 U.S. at 346.

held that the California regulations did not offend the Sherman Act.[15]

A contrary conclusion was reached in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, *supra*. This Court there faced a challenge to the enforcement of a Louisiana statute which allowed distillers to negotiate a minimum resale price with one retailer, and then made that price binding on all retailers selling that distiller's brand of liquor. The statute was thus very similar to that involved in this case,[16] with the exception that distillers were not required to establish minimum resale prices for their brands if they chose not to.

Even though the Louisiana statute was unquestionably an enactment of the State acting as sovereign, and reflected a clear policy decision rejecting unrestrained competition, the Court held that the statute was invalidated by the Sherman Act.[17] Un-

[15] In addition to holding that the Sherman Act does not apply to programs in which the state actively regulates a sector of the economy (317 U.S. at 350-352), the Court relied on the congruence of the state program there at issue with the policies of the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, 7 U.S.C. 601 *et seq.*, in holding that it did not conflict with that statute (317 U.S. at 352-359).

[16] Indeed, California provides for a similar private remedy to enforce compliance. Cal. Bus. & Prof. Code § 24752 (West 1964).

[17] The Court also ruled that the statute was not saved by the Miller-Tydings Act, ch. 690, Tit. VIII, 50 Stat. 693 (1937), which at that time permitted certain "fair trade" laws. That inquiry was necessary only because the Court decided that the statute would otherwise have to be struck down under the Sherman Act.

like the statute in *Parker*, the Louisiana statute permitted private anticompetitive conduct over which the State retained no check or control. Stating its holding succinctly, the Court observed that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown*, 317 U.S. 341, 350." *Schwegmann Bros.* v. *Calvert Distillers Corp., supra*, 341 U.S. at 389.

The difference between the present mandatory resale price maintenance program and the so-called optional program struck down in *Schwegmann* is therefore merely a difference of degree. There, as here, "non-signers" were compelled by the State to observe the resale price maintenance restraint whether they wished to do so or not. The program there was optional only for the producer. And there, as here, the state statute conferred on the producer unregulated discretion over the substance of the restraint being imposed by state compulsion—thus giving to producers precisely the power squarely denied them by federal law (now specifically reasserted in this context by the Consumer Goods Pricing Act of 1975).

This case is thus unlike *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *New Motor Vehicle Board of Cal.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), which concerned statutes that restricted private economic activity in a potentially anticompetitive manner but, at the same time, provided for continued state supervision and control over the restraint. In

Bates, which concerned a state bar disciplinary rule prohibiting advertising by attorneys, the Court noted (433 U.S. at 361-362) that the advertising ban was subject to "pointed re-examination" by the Arizona Supreme Court in any enforcement proceeding and that the state bar was itself under the court's "continuous supervision." Similarly, in *New Motor Vehicle Board*, which involved a statute restricting the location of new automobile dealerships in proximity to established dealers, the law did not allow private parties to decide which new dealerships would be permitted; instead it placed that decision in the hands of the New Motor Vehicle Board, a California state agency directed by law to give notice to affected parties and hold a hearing before making its decision. And that agency also could maintain "ongoing regulatory supervision" over the duration of any temporary restraint on the establishment of a new dealership. 439 U.S. at 110.[18]

The California Supreme Court, in the opinion relied on below, correctly discerned from all these cases a requirement that the state statute not leave private parties with the "ultimate power of decision" over the restraint, or leave the state with "no control over the substance of their actions." *Rice* v. *Alcoholic*

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[18] Moreover, the Sherman Act itself does not prohibit all vertical agreements restricting the location of distributorships, but permits such agreements where competition is not unreasonably restrained. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). See also *Exxon Corp.* v. *Governor of Maryland, supra.*

Beverage Control Appeals Board, supra (Pet. App. C-16). Similarly, the Third Circuit, when faced with a statute compelling liquor dealers to fix minimum prices under a system virtually identical to the California statute involved here, held it to be invalid under the Sherman Act because it gave the government "no power to approve, disapprove, or modify the prices fixed by private persons." *Norman's on the Waterfront, Inc.* v. *Wheatley,* 444 F.2d 1011, 1018 (3d Cir. 1971). See also 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213 (2d ed. 1978), and cases cited therein.

The lack of state supervision or control over the substance of the restraint, to assure protection of the public interest, is in our view decisive of the preemption question here. As Mr. Justice Blackmun explained in his opinion concurring in the judgment in *Cantor* v. *Detroit Edison Co., supra,* 428 U.S. at 611:

> A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed.

The requirement of state supervision or control derives at bottom from the need to reconcile the aims of the Sherman Act, on the one hand, with the interests of the states in a federal system, on the other.

The Sherman Act was passed in an era of concern over "the vast accumulation of wealth in the hands of corporations and individuals," and the fact that "combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Standard Oil Co.* v. *United States,* 221 U.S. 1, 50 (1911). Aggregations of economic power subject to the control of the state, or other restrictions which replace competition with state control, do not pose the same potential for abuse.

Where the state merely requires private parties to engage in anticompetitive conduct, but leaves their conduct entirely subject to their own control, these considerations are reversed. All the concerns embodied in the Sherman Act, relating to the dangers of unrestrained anticompetitive conduct, are present to the same extent as if the state were not involved at all. Indeed, given the incentive for private companies to engage in such behavior, the state's "requirement" that they do so will often be superfluous. At the same time, if the state retains no control over the conduct of the parties or the substance of the restraint, then the state's interest can no longer be described as an interest in subjecting a portion of its economy to *its own* control. Instead, the only interest at stake is an interest in turning a sector of the economy over to the control of private parties without having them restrained either by the Sherman Act or by the state. This is an interest which the Supremacy Clause does not permit. See *Northern*

Securities Co. v. *United States,* 193 U.S. 197, 346 (1904).

Here California has simply sent wine producers out with a mandate to set the prices at which their products may be sold by any wholesaler in either of two of the three trading areas in the State. The State's role is not to regulate or even approve the prices established but rather to enforce them without question through the sanctions of fines and suspension of licenses of those wholesalers who fail to comply. The State is thus not engaged in regulation, which typically has some coincidental anticompetitive effect. It has, rather, simply countermanded the federal policies expressed in the Sherman Act. There is no active state supervision which could reduce the "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy." *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 362. However much deference is due the states in their regulation of commerce within their borders, it cannot authorize so plain a conflict with federal policy as this.[19] The California statute is merely a pro tanto

[19] Such deference may be appropriate where a state law with potential anticompetitive effects does not—as here—absolutely traverse clear federal policy but, instead, shares the "basic purposes" of an existing federal law. See *Exxon* v. *Governor of Maryland, supra,* 437 U.S. at 130-131 (state law objectives similar to those of the Robinson-Patman Act); *Parker* v. *Brown, supra,* 317 U.S. at 354-357 (state law consistent with the policies of the Agricultural Marketing Agreement Act of 1937).

Here federal legislation applying specifically to the liquor industry—the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*—incorporates important federal antitrust policies

repeal of the Sherman Act, and therefore is invalid under the Supremacy Clause unless general preemption principles are superseded by the Twenty-First Amendment.

II. THE SECOND SECTION OF THE TWENTY-FIRST AMENDMENT DID NOT ABROGATE CONGRESS' OWN POWER TO REGULATE INTERSTATE COMMERCE IN LIQUOR AND DID NOT REVOKE THE SUPREMACY CLAUSE WITH RESPECT TO REGULATION OF THE LIQUOR INDUSTRY[20]

Section 2 of the Twenty-First Amendment declares that importing liquor into a state in violation

and is thereby contrary to the policies of the California law. In the Federal Alcohol Administration Act, Congress, *inter alia,* prohibited potentially anticompetitive practices such as tying arrangements characteristic of the liquor trade (27 U.S.C. 205(b), commercial bribery (27 U.S.C. 205(c)), consignment sales (27 U.S.C. 205(d)), and interlocking directorates (27 U.S.C. 208). In its provision on interlocking directorates, Congress adapted to the liquor industry the policies of Section 8 of the Clayton Act, 15 U.S.C. 19. Congress modeled the statute as a whole on the liquor industry's Codes of Fair Competition, developed under the National Industrial Recovery Act, but specifically declined to include price disclosure and other provisions designed to reduce the vigor of competition. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935). As with other regulated sections of the economy, the Sherman Act applies to the liquor industry, *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945), and the Federal Alcohol Administration Act is silent with respect to prices and price competition.

[20] The Federal Trade Commission has not considered the Twenty-First Amendment question in this case, and its attorneys therefore did not participate in the preparation of this portion of the brief.

of the state's laws is "hereby prohibited." [21] The Amendment is not a self-executing criminal provision, however, nor has Congress generally made it a federal crime to import liquor into a state in violation of state law.[22] The meaning of this obscure language is discernible only through a review of its origin in the interplay of state regulation of liquor and judicially-developed restrictions on state regulation of interstate commerce.[23]

A. State Regulation Of Liquor, 1847-1933

The states regulated liquor free from constitutional restraint until 1890, when the Supreme Court held that the Commerce Clause, even in the absence of congressional action, denied states the power to prohibit trade in liquor to the extent the liquor had passed through interstate commerce. *Leisy* v. *Hardin*, 135 U.S. 100, 109-110 (1890), overruling *The License*

[21] The provision "constitutionalized" the Webb-Kenyon Act, 27 U.S.C. 122, discussed in detail below; the statute and the constitutional provision are thus coterminous, and petitioner's reliance on the Act (Pet. Br. 12-13, 34-37) adds nothing to its argument. See also note 26, *infra*.

[22] It has done so only with respect to "dry" states, those which prohibit the use of liquor with more than 3.2 percent alcohol, other than for sacramental, medicinal or other excepted uses, and which adopt licensing requirements for legal liquor. Liquor Enforcement Act of 1936, ch. 815, Section 3, 49 Stat. 1928 (1936) (current version at 18 U.S.C. 1262).

[23] "Section 2 of the twenty-first amendment is not easy to understand, unless it is viewed in the light of its legislative history and general background." S. Rep. No. 1784, 75th Cong., 3d Sess. 3 (1938).

Cases, 46 U.S. (5 How.) 504, 577-580 (1847). But the Court said that Congress might assent to state regulation and thus authorize it (135 U.S. at 108, 119, 124). Congress promptly gave its assent. In the Wilson Act, ch. 728, 26 Stat. 313 (1890), 27 U.S.C. 121, it authorized the states to regulate liquor "upon [its] arrival" in the state "to the same extent and in the same manner as though such * * * liquors had been produced" there. The Court upheld the Wilson Act (*In re Rahrer*, 140 U.S. 545 (1891)), but subsequently held that arrival did not occur until the liquor was delivered to the consignee, thus shielding from state prohibition laws any interstate deliveries made directly to consumers. *Rhodes* v. *Iowa*, 170 U.S. 412 (1898).

While cast as an interpretation of the statute (170 U.S. at 419-421, 423-424) and expressly pretermitting whether Congress could authorize state regulation of interstate shipments prior to delivery (170 U.S. at 426), the *Rhodes* decision nevertheless emphasized the constitutional mandate for protection of interstate commerce and the threat to that mandate posed by the extraterritorial effect of state laws prohibiting shipments into their territory. 170 U.S. at 420, 422, 424. See also *Vance* v. *W.A. Vandercook, Co. (No. 1)*, 170 U.S. 438 (1898); Kerr, *The Webb Act*, 22 Yale L.J. 567, 574 (1913). (*Rhodes* held "that a State liquor law which attempted to attach to a shipment at the border of a State is repugnant to the Constitution as controlling contracts made in another State").

Forewarned, Congress, in the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. 122, again came to the aid of the dry states by itself regulating interstate commerce in liquor, prohibiting it where it violated state law. While the Act declared that interstate shipment of liquor into a state was "prohibited" where the liquor "is intended [to be] used, either in the original package or otherwise, in violation of any law of such State," it imposed no penalties. Congress intended only "to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State." H.R. Rep. No. 1461, 62d Cong., 3d Sess. 1 (1913). Under the Wilson Act as interpreted in *Rhodes* v. *Iowa*, *supra*, the states were powerless to act until the liquor reached the consignee.[24] By prohibiting such shipments as a matter of federal law, the bill "would permit the State officers * * * to seize such liquors [if] it was intended to be used in violation of the laws of the State * * *." H.R. Rep. No. 1461, *supra*, at 2. The bill thus did no more than "give the various States the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate-commerce law from the action of the States and discontinue the

[24] Even commercial amounts of liquor—a shipment of 500 halfpints, 250 pints, and 140 quarts of liquor was cited—were, under "[t]he sacred law of interstate commerce[,] protected * * * from molestation by State officers, not only while in transit, not only while they remained in the express office or depot, but also until they were actually delivered to those who intended to violate the State laws." H.R. Rep. No. 1461, *supra*, at 2.

handicap under which they now labor * * * and leave them freer to break up the 'blind tigers' and 'bootleggers' that infest many 'dry' States." *Ibid.* See also S. Rep. No. 1060, 62d Cong., 3d Sess. 24-25 (1913).[25]

The Court upheld the Webb-Kenyon Act as a regulation of interstate commerce, acknowledging Congress' limited purpose to relieve the state of the restriction otherwise imposed by the Commerce Clause. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 323-324 (1917); *McCormick & Co.* v. *Brown*, 286 U.S. 131, 140-141 (1932).

The ratification of the Eighteenth Amendment and the enactment of the National Prohibition Act ("the Volstead Act"), ch. 85, 41 Stat. 305, repealed, ch. 740, 49 Stat. 872, mooted the questions of state power under the Commerce Clause and the constitutionality of the Webb-Kenyon Act. At the same time, the Eighteenth Amendment not only imposed Prohibition, but represented an independent grant of authority to Congress beyond the scope of federal power under the Commerce Clause. *National Prohibition Cases*, 253 U.S. 350, 387 (1920). For the states, however, the authorization contained in Section 2 of that amendment merely

[25] The law was passed over vigorous constitutional objections and President Taft's veto on constitutional grounds (49 Cong. Rec. 4291-4292 (1913)) on the recommendation of Attorney General Wickersham. *Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of their Interstate Character in Certain Cases*, 30 Op. Att'y Gen. 88, 99-100, 107, 111 (1913).

removed the Commerce Clause limitation on inherent state police powers. *United States* v. *Lanza,* 260 U.S. 377, 381 (1922).

B. Consideration And Approval Of The Twenty-First Amendment

Congress' subsequent desire to repeal Prohibition required Congress to decide what form of regulation to substitute in its place. Its own experience in attempting to regulate liquor throughout the nation, without regard to whether interstate commerce was involved, had had a chastening effect. Congress accordingly resolved to remove itself from the enforcement of regulations properly the subject of local ordinances. At the same time, its desire to return to pre-Prohibition state regulation prompted it to forestall further challenges to the constitutionality of that state regulation.

The Twenty-First Amendment, as reported out by the Senate Judiciary Committee, contained as Section 2 the provision now in effect as Section 2 of the Amendment—an adoption in simplified form of the Webb-Kenyon Act. It also contained—as Section 3—a provision that would have authorized both the states and Congress "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." S. Rep. No. 1022, 72d Cong., 2d Sess. (1933); see also 76 Cong. Rec. 4138-4139 (1933).

The floor manager of the bill, Senator Blaine, stated that the purpose of Section 2 was to secure for the dry states the power over interstate liquor

already contained in the Webb-Kenyon Act. That Act, he explained, was construed by the Court in *Clark Distilling Co.* v. *Western Maryland Ry Co., supra,* as having been "designed to give the State * * * power of regulation over intoxicating liquor from the time it actually entered the confines of the State." 76 Cong. Rec. 4140 (1933). But because the Court was divided in that case "and that division of opinion seems to have come down to a very late day," the Judiciary Committee "proposed to write permanently into the Constitution" the "pending proposal," which would "restore[ ] to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." *Id.* at 4141. Senator Blaine expressed the committee's view that since Webb-Kenyon had been "sustained by a divided court, * * * we could well afford to guarantee to the so-called dry States the protection designed by section 2." *Ibid.*[26]

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[26] Senator Walsh of Montana reiterated this view later in the debate (76 Cong. Rec. 4219 (1933)):

> The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter.

Senator Borah, the other leading proponent of Section 2, argued that the uncertainty of the constitutionality of the Webb-Kenyon Act, and the fact that the dry states would have to rely on the continuing acquiescence of Congress, justified putting the provision in the Constitution. *Id.* at 4170. Even approval on constitutional grounds by the present Court would not guarantee like approval in the future, Senator

The balance of the debate was largely devoted to the wisdom of prohibiting saloons and authorizing Congress, along with the states, to enforce that prohibition as provided in the proposed Section 3. No one stood to defend saloons, which were universally regarded as a great evil.[27] The question was not whether there should be saloons, but whether something properly the subject of a local ordinance should be in the Constitution.[28] The dominant theme was that the federal effort to regulate local mores and morals, compelled by the Eighteenth Amendment, was an absolute failure, and that it should not be continued even by narrowly restricting the scope of the prohibition to saloons.[29] The states had long

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Borah argued, noting the overruling of the *License Cases* more than 40 years later in *Leisy* v. *Hardin, supra,* and *Bowman* v. *Chicago & Northwestern Ry. Co.,* 125 U.S. 465 (1888). 76 Cong. Rec. 4171 (1933).

[27] See, *e.g., id.* at 4219-4220 (Sen. Glass), 4226 (Sen. Robinson), 4228 (Sen. Borah).

[28] See, *e.g., id.* at 4144 (Sen. Wagner), 4176-4177 (Sen. Walsh of Massachusetts). Senator Wagner argued that Section 3 brought in through the back door the very prohibition meant to be thrown out through the front door of Section 1. *Id.* at 4147-4148.

[29] 76 Cong. Rec. 4130 (1933) (Sen. Fletcher), 4143 (Sen. Blaine), 4144-4145, 4146, 4147-4148 (Sen. Wagner), 4172, 4173-4174 (Sen. Borah), 4177 (Sen. Walsh of Massachusetts), 4220 (Sens. Glass and Reed), and 4227 (Sen. Bingham).

While a grant of concurrent power would clearly have implied supreme federal power under the Supremacy Clause (*id.* at 4143, 4156, 4774-4776), including the power to compel states to accept interstate liquor shipments against their will (*id.* at 4173, 4174), the scope of federal power in the absence

regulated liquor, and Congress had acquiesced in that regulation. In the view of the Congress that enacted the Twenty-First Amendment, it was only the Supreme Court's expansive reading of substantive economic doctrines into the Commerce Clause that prompted the Court to find there an inherent restriction on state power under that clause *simpliciter.* See 76 Cong. Rec. 4172 (1933). That view, not yet

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of Section 3 was hotly contested. Some thought Congress would have no power to regulate liquor at all (*id.* at 4141, 4142), while others thought Congress would retain its general power over interstate commerce (*id.* at 4219), and perhaps gain an implied power to enforce Section 2—that is to protect dry states against unwanted liquor from neighboring wet states (*id.* at 4172, 4225, 4226).

The remarks of Senators Blaine and Wagner relied on by Amicus Virginia Beer Wholesalers Association (VBWA Br. 9-11) as proof that Congress rejected Section 3 because it wanted the states to retain "exclusive control over liquor traffic given [them] by section 2," must be read in the light of this considerable diversity of views and can hardly be considered an expression of the intent of Congress. Moreover, it is not clear that Senator Blaine's remarks, considered in their entirety, unequivocally support petitioner's position. While Senator Blaine did, in the course of expressing "his own personal viewpoint" (as distinct from that of the Judiciary Committee), state that the purpose of Section 2 was "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States" (*id.* at 4143), he also stated (*ibid.*) that Section 3 was designed "to take away from the States the powers that the States would have in the absence of the eighteenth amendment." Nothing in his remarks elsewhere suggests that Senator Blaine believed that before the enactment of the Eighteenth Amendment state laws were not subject to the operation of the Supremacy Clause when they conflicted with federal laws enacted pursuant to a constitutional power of Congress.

then repudiated by the Court, denied states the power, exercised continuously since colonial days, to regulate liquor under their general police powers. With the repeal of Prohibition, Senator Borah believed that "to adopt and enjoy their own policies, [dry States need] some other provisions of the Constitution[] than those which existed prior to the adoption of the eighteenth amendment." *Id.* at 4172. The problem presented by decisions of this Court inferring a lack of state power from congressional inaction under the Commerce Clause "was sought to be remedied by the Webb-Kenyon Act," Senator Borah said; and he thought it just and fair to "incorporat[e] it permanently in the Constitution of the United States." *Ibid.*

The function of both Webb-Kenyon and Section 2, then, was not to diminish Congress' power over interstate commerce, but to augment the power of the states by eliminating the Commerce Clause restriction, thus restoring to them the power to regulate liquor they had once exercised. While Congress generally sought to remove the federal government from direct regulation of the local sale and consumption of liquor, its debate was against the backdrop of both the Eighteenth Amendment, which extended the power of Congress beyond the limits of interstate commerce to pervasive, nationwide enforcement of prohibition wherever liquor might be made, sold or used, and the proposed Section 3, which would have retained for Congress this power reaching beyond the accepted scope of the Commerce Clause. There was no discussion in the debates of limiting congressional power to enact laws under the Commerce Clause or any other constitutional grant of power in existence before passage of the Eighteenth Amendment.

In the absence of any such discussion, the only basis for finding an intent on the part of Congress to subordinate its established legislative powers to those of the States is to infer it from the evident purpose of Congress to relieve the States of the Commerce Clause restriction on their powers. Such an inference appears to underlie Mr. Justice Frankfurter's assertion—relied on by petitioner (Pet. Br. 25) and an amicus (VBWA Br. 15-16)—that "the Sherman Law, deriving its authority from the Commerce Clause," must "yield to state power drawn from the Twenty-first Amendment." *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 300-301 (1945) (Frankfurter, J., concurring opinion). This question has, of course, not been decided by this Court (*Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 282 n.9 (1972)).

In our view, no such inference is justified. The Twenty-First Amendment does not in terms restrict in any way the pre-Eighteenth Amendment legislative powers of Congress, except the power to require "transportation or importation into any State * * * of intoxicating liquors, in violation of the laws thereof * * *." It is true that the restrictions of the Commerce Clause itself on state legislative authority (which the Amendment's sponsors sought to eliminate) derive only by negative implication from the

powers that Clause confers on Congress—thereby implying a certain symmetry between the constitutional grant and its negative implications. But this does not mean that the Constitution itself could not be amended to reduce the latter without a concomitant restriction of the former. That, we submit, is what happened here. Since the apparent intention of those who adopted the Twenty-First Amendment was only to eliminate the Clause's negative implications for state liquor regulation, Congress should not be deemed to have restricted its own constitutionally conferred legislative powers wholly by unstated implication.

C. Subsequent Action By Congress

In 1935, not long after its approval of the Twenty-First Amendment, Congress exercised the power it believed it still enjoyed to regulate the interstate liquor industry: it enacted the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*[30] Congress

[30] Congress did not enact this federal legislation at the time it sent the proposed amendment to the states because it expected ratification to take at least two years. See 76 Cong. Rec. 4002 (1933) (Sen. Borah); *id.* at 4149 (Sen. Walsh of Montana). Cf. *id.* at 4005, 4140 (Sen. Blaine); see also H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935) ("House Report"). By December of that year, when the Amendment was ratified, Congress had enacted the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), repealed, Pub. L. No. 89-554, 80 Stat. 648 (1966), authorizing industries to develop national codes of fair competition; the beer industry did so voluntarily, while President Roosevelt imposed codes on the wine and distilled liquor trades. With the demise of the codes in *Schecter Poultry Corp.* v. *United States* ("*Schecter Poultry*"), 295 U.S. 495 (1935), Congress was compelled to act

specifically considered the possibility of state-federal conflict and elected to override contrary state law. Congress found that the distilled spirits, wine, and beer industries were national in scope, not amenable as a practical or constitutional matter to effective state regulation, and that they presented serious problems owing to the involvement of organized crime. "Federal regulation, in the field in which the Constitution permits the exercise of Federal authority, is necessary to deal with these problems." House Report at 1-2. The principal regulatory tool was a license requirement imposed on all members of the liquor industry, and it was imposed even on those doing a strictly interstate business because of the need to prevent evasions of both federal law and state laws enacted under Section 2 of the Twenty-First Amendment. See House Report at 7; *Hanf* v. *United States*, 235 F.2d 710 (8th Cir. 1956), cert. denied, 352 U.S. 880 (1956). The Court summarily rejected a challenge to Congress' continuing power to regulate the liquor industry under its Commerce Clause powers in *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 172-173 (1939), affirming the constitutionality of the Federal Alcohol Administration Act.

In that same act, Congress explicitly considered and provided for the supremacy of its laws over conflicting state law. Congress imposed detailed labeling

promptly to fill the void in federal regulation. See House Report at 2-4; S. Rep. No. 1215, 74th Cong., 1st Sess. 2-3 (1935) ("Senate Report").

requirements and prohibited the alteration of labels on liquor "held for sale in interstate * * * commerce or after shipment therein * * *" 27 U.S.C. 205(e), para. 2. Although the administrator was authorized to make exceptions where states imposed additional labeling requirements (*ibid.*), the House Report, at 14, specified that this was allowed only if the state requirement was "not in conflict with the Federal requirements." [31] Congress similarly exercised its supreme power over interstate commerce in broadly prohibiting consignment and bulk sales. 27 U.S.C. 205(d), 206(a).[32] Congress also expressly considered whether it had the constitutional power to regulate state agencies and officials with respect to labeling and consignment sales where the state had established

[31] The Senate Report concurred in most of the House Report and did not address provisions, including labeling and consignment sales, with which it agreed. Senate Report at 3.

[32] The House recommended authorization of bulk sales but was careful to provide that its authorization was not to be construed as overriding contrary state prohibitions (House Report at 10), which would occur under the Supremacy Clause. See also *id.* at 6 (federal permit "does not authorize * * * operations which are prohibited by State laws"). The Senate opposed authorizing bulk sales because such sales would facilitate violations of both dry state laws and federal tax and labeling laws, and its view prevailed. 27 U.S.C. 206(a).

Congress permitted the states to require separate corporate entities whose directorships might technically violate its own prohibition against interlocking directorates; it did so because the state policies would not create anticompetitive interlocks, in conflict with Congress' purpose, not because Congress lacked the power to override state law. House Report at 15-16; 27 U.S.C. 208(b).

itself as the monopoly distributor of alcoholic beverages, and concluded that it had. House Report at 11, 14.[33]

Congress enacted these explicit restrictions on State power only two days after it formally re-enacted the Webb-Kenyon Act, ch. 740, Section 202, 49 Stat. 877, to eliminate doubts about its continuing validity in light of the enactment and then the repeal of the Cullen Beer Act, which similarly divested "3.2" beer of its "interstate character." S. Rep. No. 1330, 74th Cong., 1st Sess. 5 (1935); H.R. Rep. No. 1601, 74th Cong., 1st Sess. 5-6 (1935). Congress could not have intended in Webb-Kenyon (and thus in the Twenty-First Amendment) to subordinate its legislative power to that of the states,

[33] Questions of constitutional power were far from academic in 1935 in the wake of *Schechter Poultry, supra,* and other decisions holding early New Deal laws unconstitutional. Thus, in introducing the liquor regulation bill, its sponsor, Representative Cullen, took care to assure the House (79 Cong. Rec. 11714 (1935); emphasis added):

> *No provision of the bill is violative of the Constitution* either because it denies a fundamental right secured by the Constitution or *because it invades a field of regulation reserved by the Constitution to the States.* [Nor will the bill] suffer from the infirmity of invalid delegation of legislative power.

See also *ibid.* (the committee was "careful to confine the bill to the Federal field") and *id.* at 11712 (Rep. Sabath).

In the following year, Congress again regulated the liquor industry by enacting legislation to assist dry states in enforcing their prohibition laws. Liquor Enforcement Act of 1936, ch. 815, Sections 1-12, 49 Stat. 1928. Congress has not since exercised its power to regulate interstate commerce in liquor.

given its exercise of that power, expressly overriding conflicting state law, just two days later.

The views of the Seventy-Fourth Congress are entitled to substantial weight in determining the meaning of the Twenty-First Amendment. It was close in time to the Congress which proposed the Amendment,[34] and in its positive enactments it was declaring as strongly as it could its understanding that the Twenty-First Amendment did not reverse state-federal relations under the Supremacy Clause in the regulation of the liquor trade. Subsequent legislation is frequently relied upon to ascertain the intent of an earlier Congress, or of the Constitutional Convention in promulgating the Constitution. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630-631 (1935); *Martin* v. *Hunter's Lessee*, 14 U.S.

[34] For this reason, these views of the 74th Congress carry far more weight than the statement (see Pet. Br. 22) made 40 years later in the Senate Report on the bill repealing the Miller-Tydings and McGuire Acts to the effect that despite repeal of those statutes alcohol manufacturers would be free to continue enforcing resale prices "in States which pass price fixing statutes pursuant to the Twenty-First Amendment." S. Rep. No. 94-466, 94th Cong., 1st Sess. 2 (1975). That statement, in any event, does not refer specifically to state enforcement of producer-set resale prices. As the House Report on the same bill stated, "The repeal [of the Miller-Tydings and McGuire Acts] would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the Twenty-First Amendment to regulate the importation of liquor from outside the State. H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 n.2 (1975).

(1 Wheat.) 304, 351-352 (1816). Congress' action in establishing the Federal Alcohol Administration Act confirms what was said in the debates on the Twenty-First Amendment: the states' power to regulate liquor, whether moving in intrastate or interstate commerce, was to be relieved of the limitations imposed by the Commerce Clause *simpliciter*. But Congress did not intend to subordinate its power under the Commerce Clause to that of the states.

D. Judicial Interpretation

This Court has repeatedly held that the Twenty-First Amendment operated to relieve the states of the restriction imposed by the Commerce Clause on their police power over the regulation of liquor moving in interstate commerce.[35] But it has emphasized that the Amendment did not repeal the Commerce Clause *pro tanto* with respect to liquor: it continues to operate as a restraint on state power where the state's regulation is not related to the purpose of the Amendment,

[35] *Craig* v. *Boren*, 429 U.S. 190, 206 (1976); *Heublein, Inc.* v. *South Carolina Tax Comm'n*, *supra*, 409 U.S. at 283; *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 42 (1966); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 344, 346 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939). The price posting at issue in *Seagram* involved only licensees' posting of their own selling prices, not resale prices binding on wholesalers or retailers who purchased the liquor from them (384 U.S. at 38-39 & 53-54); and this Court found no "clear conflict" between the Sherman Act and the state law at issue (*id.* at 45). Cf. Petitioner's Brief at 26-27.

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), and it continues to operate as a grant of authority to Congress to regulate interstate commerce in liquor. *Jameson & Co.* v. *Morgenthau, supra*; *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945).

Like other provisions of the Constitution, the Twenty-First Amendment does not stand alone, but must "be considered in the light of the other[s], and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 332. Thus, this Court has held that the relief given by the Amendment from the restrictions imposed by the Commerce Clause did not also relieve the states of the restrictions imposed by such other constitutional provisions as the Export-Import Clause (*Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964)) and the Fourteenth Amendment (*Craig* v. *Boren, supra*, 429 U.S. at 206; *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971)). While the Court has referred to the Amendment "as conferring something more than the normal state authority over public health, welfare, and morals" (*California* v. *LaRue*, 409 U.S. 109, 114 (1972)),[36] it subsequently noted that it had not yet addressed directly "how that

[36] Even there, however, the Court noted only that Congress sought, as we have argued above, to relieve the states of the restriction imposed on their powers by the Commerce Clause *simpliciter*. *Ibid.*; *Hostetter* v. *Idlewild Bon Voyage Liquor, supra*, 377 U.S. at 330.

Amendment affects Congress' power under the Commerce Clause." *Heublein, Inc.* v. *South Carolina Tax Commission, supra*, 409 U.S. at 282 n.9.

E. Recognition Of the Supremacy Of Federal Policy In This Case Would Not Impinge On The Basic State Interests Protected By The Twenty-First Amendment

As we have shown (pages 40-45, *supra*), Congress enacted the Federal Alcohol Administration Act shortly after passage of the Twenty-First Amendment on the evident assumption that the Supremacy Clause continued to make federal laws affecting interstate trade in liquor prevail over conflicting state laws, at least where the core state interests addressed by Section 2 of the Amendment (see pages 34-40, *supra*) are not concerned. Congress has shown no inclination to infringe on those interests by imposing a liquor trade on states that do not want it, and certainly an acceptance of federal supremacy in the present case will have no such result.

Invalidating those portions of California wine-pricing laws that directly conflict with the central policy of the Sherman Act will by no means deprive the State of the power to carry out its avowed policy of promoting temperance (Cal. Bus. & Prof. Code § 24749 (West 1964)). Thus, California may prohibit the sale of alcohol within its borders, restrict the number of licensed sellers, regulate their location, and discourage use and abuse of alcohol through

educational programs.[37] And if it prefers to maintain a policy of high prices, it may do so by such means as imposing heavy sales and excise taxes.[38] In short, a decision that the Sherman Act preempts the state provisions at issue here by virtue of the normal operation of the Supremacy Clause will in no way return the federal government to that role of dictator of local mores respecting alcohol use that

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[37] In contrast to such measures, the State's uniform price-maintenance scheme is unlikely to promote temperance in any significant respect. The literature on the effect of resale price maintenance for liquor, canvassed by the California courts (see Pet. App. C-37 to C-38), shows that the demand for liquor is largely price inelastic, so that the lower prices which would follow the end of the resale price maintenance would not result in increased consumption. See Moreland Commission, Study Paper No. 5, "Resale Price Maintenance in the Liquor Industry," at 40-60, and Report and Recommendations No. 3, "Mandatory Resale Price Maintenance," at 17-23 (cited in *Seagram & Sons, Inc.* v. *Hostetter, supra,* 384 U.S. at 39 n.8). See also California Department of Finance, *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies* 14-20 (1974). The fears of aggressive "price wars" and increased consumption are based on a single short period in New York late in the Depression which, on close examination, proved to involve many factors other than increased individual liquor consumption.

[38] To the extent that California's current price maintenance policy is aimed simply at protecting small retailers and wholesalers from price competition (see Pet. App. C-34 to C-36), it has no relation to the concerns of the Twenty-First Amendment and flies in the face of the Sherman Act. We note that it is this interest—and not temperance—that petitioner, an association of liquor dealers, described as the basis for its intervention below (A. 25-27).

the enacters of the Twenty-First amendment were at pains to disavow.

A contrary holding could have serious effects on a broad range of federal regulation. Other federal laws that—like the Sherman Act—are of general application might then be subject to piecemeal dismemberment as they apply to the liquor industry, despite indications of express congressional intent to override conflicting state laws or to wholly occupy the field. To cite only a few of the many possible examples, a state might prohibit contents disclosure on liquor labels, contrary to Congress' express declaration in 27 U.S.C. 205(e); or it might declare that union organization of liquor industry employees facilitated the involvement of organized crime, and accordingly prohibit liquor industry employees from exercising their rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to organize, engage in collective bargaining, or strike. States might seek to prohibit disclosure of important corporate information in securities of liquor corporations where disclosure would otherwise be required under the Securities Act, 15 U.S.C. 77a *et seq.* Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). To protect itself from the illegal diversion of liquor, a state might seek to require special licenses for interstate common carriers handling liquor and so deny authority to carriers whose service was authorized by the Interstate Commerce Commission in the "public convenience and necessity." Pub. L. No. 95-

473, 92 Stat. 1409 (1978) (to be codified at 49 U.S.C. 10922(a)(2)).[39] Similarly, federal regulatory provisions designed to facilitate the collection of tax revenue might be declared subordinate to conflicting state regulation.[40]

In sum, a decision against federal supremacy in this case would not only frustrate important federal antitrust policies but would at least encourage litigation that could threaten federal policies in other areas. Where, as here, allowing federal law to prevail over conflicting state law does not threaten any state interest in freely choosing among promotion, tolerance, or prohibition of the liquor trade, there is no need to risk such unsettling consequences.

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[39] See *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (Motor Carrier Act); cf. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939). See also *Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77 (1958); *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U.S. 351 (1967); *Bowman* v. *Chicago & Northwestern Ry. Co., supra*.

[40] In *Goldstein* v. *Maryland*, No. 16-79-2163 (D. Md.), a liquor distributor is seeking a declaratory judgment that Bureau of Alcohol, Tobacco and Firearms regulations are invalid because of a conflict with Maryland law, based on *Castlewood International Corp.* v. *Simon*, 596 F.2d 638 (5th Cir. 1979) (holding, on basis of Twenty-First Amendment, that federal statute restricting discounts to retailers by liquor wholesalers cannot prevail over less restrictive state statute). Cf. *Stillinovic* v. *United States*, 336 F.2d 862 (8th Cir. 1964); *United States* v. *Goldberg*, 225 F.2d 180 (8th Cir. 1955); S. Rep. No. 2090, 85th Cong., 2d Sess. 167-169 (1958).

CONCLUSION

The decision of the California Court of Appeal should be affirmed.

Respectfully submitted.

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